

**** E-filed February 16, 2010 ****

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MULTIVEN, INC., a Delaware corporation,
Plaintiff,
v.
CISCO SYSTEMS, INC., a California
corporation,
Defendant.

No. C08-05391 JW (HRL)

**ORDER GRANTING CISCO
SYSTEMS, INC.'S DISCOVERY
MOTION**

[Re: Docket No. 76]

AND RELATED COUNTERCLAIMS

Plaintiff Multiven, Inc. ("Multiven"), a provider of service and maintenance support for router and networking systems, sued defendant Cisco Systems, Inc. ("Cisco"), a leading provider of Internet Protocol-based networking technologies, alleging violations of the Sherman Antitrust Act and related state claims. Cisco then countersued Multiven as well as Pingsta, Inc. ("Pingsta") and Peter Alfred-Adekeye, a former Cisco employee and current Chief Executive Officer for Multiven and Pingsta. Cisco's counterclaims allege copyright infringement, violation of the Computer Fraud and Abuse Act, false advertising in violation of the Lanham Act, and related state claims.¹

Cisco now moves to limit the scope of a nondisclosure agreement ("NDA") between Multiven and third-party James Light. It also moves for relief from the seven-hour limit for Light's
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¹ In this motion, the court will refer to all three counterdefendants simply as "Multiven."

1 deposition. Multiven opposes the motion. Upon consideration of the moving and responding
2 papers, as well as the arguments presented at the motion hearing, this court grants Cisco's motion.

3 DISCUSSION

4 A. Background of James Light

5 Light was Multiven's Vice President of Sales on a contract basis from October 2008 to
6 February 2009. He alleges that after he told Multiven that he disagreed with the lawsuit it filed
7 against Cisco, Adekeye terminated his consulting agreement and asked him to destroy all Multiven
8 data and information in his possession. After his termination, Light claims he contacted Multiven's
9 outside counsel expressing concerns he had about Adekeye and what he believed were criminal and
10 fraudulent activities, but that he received no response. (*Id.* ¶¶ 5, 10, 39, 42, 43, Ex. 4.)

11 At some point, Light then voluntarily approached Cisco to disclose information about
12 Multiven "because [he] felt morally obligated to do so." (*Id.* ¶ 56.) Soon thereafter, he received an
13 email from Multiven's in-house counsel, Matthew Goldberg, indicating that Multiven had learned
14 he had talked to Cisco. Goldberg reminded Light of the NDA he had signed and stated that
15 Multiven would "enforce its rights to the full extent of the law" if Light had breached the NDA.
16 Goldberg asserted that "in addition to business, technical, financial, and customer information, any
17 information related to [Multiven] employees that you only know because of your work with
18 [Multiven] is Confidential" pursuant to the NDA.² (*Id.* at Ex. 2.) However, Multiven did not move
19 for a protective order to prevent Light's communications with Cisco, nor, apparently, carry out its
20 threat of other legal action against him.

21 B. Seven-Hour Deposition Limit

22 Both Cisco and Multiven have a strong desire to depose Light, and they intend to conduct
23 jointly his deposition. Cisco moves for leave to extend this deposition beyond the seven-hour limit
24 set forth in the Federal Rules. *See* Fed. R. Civ. P. 30(d). Specifically, Cisco requests a nine-hour
25 deposition, with the first four hours allocated to it and the remaining five hours allocated to
26 Multiven. Multiven does not oppose extending the time, but seeks a range of seven to fourteen

27 ² In light of the discussion that follows concerning the NDA, it is interesting that Goldberg
28 apparently said nothing to Light about his alleged membership in Multiven's control group or his
disclosure of privileged information.

1 hours, with it receiving six to seven hours of that time. Regardless of the total time, it wishes to
2 depose Light first and argues that Cisco should get only one-quarter of the available time.

3 Under the circumstances, where a third-party witness is key to both Cisco's counterclaims
4 and Multiven's defenses to the same, an extension of the deposition time limit is appropriate. Light
5 has apparently agreed to a nine-hour deposition, and Multiven has not convinced the court that a
6 longer period is necessary. Given this nine-hour limit, a fair division of time between the parties is
7 five hours for Multiven and four hours for Cisco. Multiven may begin Light's deposition, but the
8 parties may split their respective blocks of time into several alternating periods, if they so choose.

9 **B. Nondisclosure Agreement**

10 The remainder of Cisco's motion concerns Light's NDA with Multiven. On account of this
11 NDA, Cisco asks in this motion for legal "cover" to interview and depose Light on topics
12 concerning its counterclaims against Multiven. Yet Multiven, at the eleventh hour, tries to turn
13 Cisco's request into its *own* motion to bar Cisco from conducting *any* deposition or interview with
14 Light on account of its allegation of improper behavior by Cisco's counsel. As discussed below,
15 Multiven's belated attempt to shift the focus of *this* motion fails.

16 Cisco wants to depose Light and conduct pre- and post-deposition interviews with him
17 concerning fifteen topics that it says are relevant to its allegations that Multiven has engaged in
18 fraudulent and potentially criminal acts. However, it is concerned that Light will be unable to do so
19 on account of the NDA, which reads:

20 Consultant agrees that all Inventions and all other business, technical and financial
21 information (including, without limitation, the identity of and information relating to
22 customers or employees) Consultant develops, learns or obtains during the period over
23 which Consultant is to be providing services that relate to Company or the business or
demonstrably anticipated business of Company or that are received by or for Company in
Confidence, constitute "Proprietary Information." Consultant will hold in confidence and
not disclose or, except in performing the Services, use any Proprietary Information.

24 (Light Decl. Ex. 1.) Cisco argues that this NDA is impermissibly overbroad because it seeks to
25 protect more than Multiven's legitimate trade secrets, and that public policy prohibits Multiven from
26 using it to block Light's testimony. Cisco therefore asks the court to declare that its proposed
27 fifteen topics are outside the scope of the NDA.

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1 In its opposition brief, Multiven primarily argued that Cisco failed to provide evidence that
2 Multiven had engaged in any wrongdoing and that public policy does not support limiting the scope
3 of the NDA. Nonetheless, by the time of the motion hearing, Multiven's opposition had shifted
4 away from one based on a lack of evidence of its alleged wrongdoing and public policy. In fact,
5 Multiven abandoned any argument that the NDA would or should bar Light's testimony as to
6 Cisco's proposed topics.

7 Instead, Multiven now argues that Light was a member of Multiven's control group, that
8 Cisco had impermissible ex parte contacts with Light, that Cisco's attorneys should be disqualified,
9 and that—in the meantime—they should not be talking to or deposing Light at all. Multiven barely
10 hinted at this argument in its opposition brief. Yet now, it asserts that this is *the* main issue of
11 dispute in this motion. To that end, mere days before the hearing on the instant motion, Multiven
12 moved to disqualify Cisco's counsel (Docket No. 89) and moved to continue the hearing on the
13 instant motion until after the court decides its disqualification motion (Docket No. 103).³

14 Multiven's belated argument is nothing more than a stealth motion to stay Light's deposition
15 without filing an appropriate motion for such relief before this court (instead, it tucked in a request
16 for a stay of discovery as part of its motion to disqualify). To be clear: the instant motion is *not* a
17 motion to disqualify Cisco's counsel, nor a motion to stay discovery and Light's deposition, nor a
18 motion for a protective order on privilege grounds. As a result, the court is not ruling on the issue of
19 privilege today. Furthermore, Multiven has failed to convince the court that it would suffer genuine
20 prejudice if Cisco were allowed to interview or depose Light while its motion to disqualify is
21 pending. Even if the court were ultimately to grant the motion to disqualify counsel, surely it could
22 also craft an appropriate remedy to protect Multiven's legitimate interests.

23 CONCLUSION

24 It is an "unremarkable proposition" that an NDA "will not stand as a barrier to discovery
25 between two parties in litigation." *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 922 (D. Nev.
26 2006). Indeed, at the motion hearing, Multiven folded its tent as to its arguments to the contrary. It

27 ³ Multiven's motion to disqualify was originally noticed before Judge Ware and set for April 12,
28 2010. Judge Ware later referred the motion to this court for a Report and Recommendation.
(Docket No. 127.) The hearing on the motion is set now for March 30, 2010.

1 not only conceded that Cisco's fifteen proposed topics were appropriate, but also that the NDA was
2 not so broad to prevent Light's testimony on the topics—thus making the NDA irrelevant for
3 purposes of this motion.⁴ Under these circumstances, the court GRANTS Cisco's motion as
4 follows: it may depose and conduct pre- and post-deposition interviews with Light as to its fifteen
5 proposed topics of interest. The court declines to extend this order to other witnesses at this time.

6 **IT IS SO ORDERED.**

7 Dated: February 16, 2010

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HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

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⁴ The court notes that is unlikely that the NDA, if it were challenged, would be upheld to prohibit Light's testimony on these topics. Interpreting the NDA to mean that Light could not disclose non-confidential information he learned while at Multiven could stifle all legitimate discovery. In addition, there even may be situations where disclosure of trade secrets and truly confidential information is necessary in the interests of justice and full and fair disclosure.

C08-05391 JW (HRL) Notice will be electronically mailed to:

Brian Curtis Vanderhoof	bvanderhoof@ropers.com
Dan Keith Webb	dwebb@winston.com
Donald Ross Pepperman	dpepperman@blechercollins.com, ljaramillo@blechercollins.com
James C. Potepan	jpotepan@ropers.com, jcecchini@ropers.com, tpierson@ropers.com
Maxwell Michael Blecher	mblecher@blechercollins.com
Michael Sungwoo Kim	mkim@rmkb.com
Patrick Martin Ryan	pryan@winston.com, DocketSF@winston.com, mthomasian@winston.com, ndelich@winston.com, tmontague@winston.com
Thomas Michael O'Leary	to'leary@ropers.com, aarriola@ropers.com, cscranton@rmkb.com, kkakiuchi@ropers.com, mkim@rmkb.com, tpierson@rmkb.com

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